Supreme Court, U.S.
FILED

0213 41 MAR 11 2003

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NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2002

TINO SAFARIAN,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner was denied his rights to due process and the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, when his attorney failed to seek an instruction on a lesser included offense and the State withheld exculpatory evidence?

LIST OF PARTIES

1. State of California

2. Tino Safarian

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In The
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October Term, 2002

TINO SAFARIAN,
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vs.
STATE OF CALIFORNIA,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioner, Tino Safarian, respectfully prays that a Writ of Certiorari issue to review the decision of the Court of Appeal of the State of California, Second Appellate District, denying his Petition for Writ of Habeas Corpus based on the deprivation of his rights to the effective assistance of counsel and due process of law. U.S. Const., amends. V, VI, XIV.

OPINIONS BELOW

On January 25, 2002, the Superior Court for the State of California, County of Los Angeles, Judge Steven Suzukawa, presiding, in an unreported Minute Order which appears in Appendix B to this Petition, denied Tino Safarian's petition

for habeas corpus based on ineffective assistance of counsel, U.S. Const., amends. VI, XIV, *Strickland v. Washington*, 466 U.S. 668 (1984), and denial of due process by the withholding of exculpatory evidence, U.S. Const., amend. XIV, *Brady v. Maryland*, 373 U.S. 83 (1963).

On September 18, 2002, Mr. Safarian filed a subsequent Petition for Writ of Habeas Corpus with the Court of Appeal of the State of California, Second Appellate District, with the Superior Court Minute Order attached. The Court of Appeal denied the Petition on September 26, 2002. The unreported order of the state appellate court appears in Appendix A to this Petition.

On October 8, 2002, Mr. Safarian sought discretionary review of the Court of Appeal's denial in the California Supreme Court. In an order which appears as Appendix C to this Petition, the California Supreme Court denied review on December 11, 2002.

BASIS OF JURISDICTION

The Court of Appeal entered its judgment denying Petitioner's Writ of Habeas Corpus on September 26, 2002. The California Supreme Court's denial of Mr. Safarian's discretionary Petition for Review was entered on December 11, 2002. As a judgment of a lower state court that is subject to discretionary review by the state court of last resort, the judgment of the Court of Appeal may be reviewed in this Court on Certiorari pursuant to 28 U.S.C. §1257; Sup.Ct.Rules 13. The grounds for invoking this Court's jurisdiction are set forth in Supreme Court Rules 10(b) and

10(c). This petition is timely filed within 90 days of the date the California Supreme Court denied his Petition for Review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment; Sixth Amendment; and Fourteenth Amendment, Section 1 are set forth in Appendix D.

STATEMENT OF THE CASE AND FACTS

This second degree murder case began with a dispute among high school students over a $50 car amplifier and a factual background that seems better suited for small claims court than the criminal system. The relevant events commenced when Petitioner's friend bought the amplifier from another student, promising to pay for it in the future. He subsequently rejected the item and returned it, claiming that it had been broken when sold to him. This was disputed by the student who had originally had the amplifier. Contending that it had been broken while in the possession of Petitioner's friend, the student continued to demand payment. A period of hostility between the two students arose in which they exchanged words while at school.

That hostility eventually led to a scuffle in a park where two of Petitioner's friends were confronted by a large number of other boys. Petitioner became involved when he and another friend returned with the first two friends to the park. Concerned about the size of the opposing crowd that they would be facing, Petitioner and another boy made the mistake of arming themselves with knives that they placed in their

waistbands under their shirts. When a scuffle ensued and the dust had settled, Petitioner had killed a boy with a single fatal stab wound to the heart and the other friend who had armed himself had stabbed another boy in the leg.

In a two count information, Petitioner was charged with one count of murder, California Penal Code section 187(a) with an allegation of personal use of a deadly weapon under California Penal Code section 12022(b) and one count of attempted murder under Penal Code sections 664 and 187(a).

Petitioner entered a plea of not guilty and was tried before a jury between June 19, 1996 and June 26, 1996. The jury was instructed on June 27, 1996 and on July 3, 1996, Petitioner was found guilty of second degree murder on the first count. In a finding that reflects the jury's consideration that there was no plan to use the knives when the boys entered the park, Petitioner was acquitted of the second count of attempted murder. On October 9, 1996, Petitioner made a motion for a new trial, which was subsequently denied. Petitioner was sentenced to a term of imprisonment of 16 years to life on October 25, 1996.

Petitioner appealed the judgment to the Court of Appeal of the State of California, Second Appellate District. That court affirmed the Superior Court and upheld Petitioner's conviction on April 8, 1998.

Thereafter, Petitioner filed a Petition for Writ of Habeas Corpus with the trial court and, on January 23, 2002, the Superior Court, Judge Steven Suzukawa denied the Petition. Among other issues, Petitioner claimed that he had been denied effective assistance of counsel through his attorney's

failure to seek an instruction on the theory that he was guilty of the lesser included offense of manslaughter based on heat of passion or sudden quarrel. Petitioner also offered as new evidence the declaration of a witness who was aware of the belligerent attitude of the boy Petitioner stabbed and saw other boys swinging bats at Petitioner. This witness, whose statements were never turned over to the defense, claimed to have been thoroughly interviewed by two police detectives in an interview room with a tape recorder on the table, in use, throughout the entire interview. Petitioner claimed that his attorney had been ineffective for failing to pursue this witness or his statements to the police and further asserted that he had been denied due process, under *Brady v. Maryland*, *supra*, by the prosecution's failure to turn this evidence over.

In denying the Petition, Judge Suzukawa opined that an instruction on heat of passion would have been inconsistent with his attorney's theory of the case and Petitioner's testimony that the stabbing was the result of either self defense or imperfect self defense. He further held that the instruction was not supported by the evidence. As for the suppressed witness statement, the court noted that the witness had been reluctant to get involved and concluded that if the prosecution had turned the statement over it would have been cumulative and would not have made the witness more willing to testify. Accordingly, the court never granted Petitioner an evidentiary hearing at which the existence and nature of this witness' statements could have been examined.

Petitioner's subsequent Petition for Writ of Habeas Corpus, filed with the California Court of Appeal, and his Petition for Review in the California Supreme Court were summarily denied. *See* Appendix A and Appendix C.

REASONS FOR GRANTING THE WRIT

The issues presented in this Petition are of significant importance to the system of criminal justice in this country. This Petition asks this Court to decide when, in light of the evidence, an attorney must recognize that despite his trial strategy, the jury must be given the opportunity to reach a favorable verdict on an alternative theory. To proceed on a theory devoid of support in the record is no strategy at all.

In addition, this Petition asks this Court to decide when a habeas petitioner has made a sufficient showing that material and exculpatory evidence was withheld to require an evidentiary hearing. The evidence, which the court did not find did not exist, was relevant both to the issues of what decisions a competent attorney may have made and to the prosecution's obligations under the due process clause. The court's speculation about what value the evidence might have had was an insufficient substitute for bringing the evidence to court and examining the witness, whose statement was suppressed, as to what he would have done had more effort been made to obtain his cooperation or had he been subpoenaed for trial despite his recalcitrance.

I. Petitioner Was Prejudiced by Trial Counsel's Failure to Request a Jury Instruction for the Lesser Related Offense of Voluntary Manslaughter Based upon Heat of Passion or Sudden Quarrel.

Under the Sixth and Fourteenth Amendments to the United States Constitution, an accused has the right in all criminal prosecutions to the assistance of counsel. The right to counsel is fundamental to whether a defendant receives a

fair trial. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It cannot be said that a defendant's constitutional rights have been protected when the assistance he receives from counsel is inadequate. *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner was entitled to rely on counsel to take appropriate steps on his behalf, *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1985), independently examine the evidence, *United States v. Tucker*, 716 F.2d 576, 593 (9th Cir. 1983), and advise him of the merits of the case against him, *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). As Petitioner did not receive this basic measure of assistance from counsel, he is entitled to relief on a petition of habeas corpus by his showing that his representation by trial counsel fell below an objective standard of reasonableness and that he was prejudiced thereby. *Strickland*, 466 U.S. at 686-92 (1984).

In this case, every witness who reasonably appeared to have actually seen what happened in the minute or two before the stabbing took place testified that a commotion had suddenly broken out. It was in this frightening chaos that the events unfolded leading Petitioner to stab the victim. This version of the events was repeated in the statements that petitioner and his codefendants made to the police and in the suppressed statement made by witness Vaagn Arutyunian.

Although, the state trial court hearing Mr. Safarian's habeas petition rejected the argument that a heat of passion instruction should have been given, claiming that the instruction was not supported by the evidence, this conclusion clearly conflates the defense's failing theory of self defense with the evidence actually presented. In fact, the People's witnesses were quite consistent in describing a situation that began calmly, escalated rapidly into yelling and shoving, and

then turned into a fracas, whose aftermath left two boys bleeding, one mortally. The instruction is also consistent with the verdict that the jury actually reached. Although the jury rejected imperfect self defense, the only theory on a lesser included offense that the jury was offered, it nonetheless acquitted Petitioner of responsibility for the stabbing he did not commit, implicitly finding that Petitioner had no intention that he and his friend would use their knives when they entered the park.

The irony of this case is that, while the court surmised that a heat of passion or sudden quarrel instruction was inconsistent with Petitioner's trial testimony that the stabbing was based on his perception that he was acting in self defense, Petitioner's testimony stood alone as the only evidence that supported the defense theory. The defense failed to subpoena the one witness that it asserted would corroborate Petitioner. Consequently, the concomitant failure to request the one instruction that most clearly matched the facts of the case was a truly tragic omission.

The weakness of the defense strategy of relying solely on Petitioner to support a claim of self defense is underscored by the fact that Petitioner's testimony was impeached by his own statements to the police in which he described reacting in an atmosphere of confusion and panic, but admitted that he did not act in self-defense. What was already a failing strategy was dealt a foreseeable coup de grace. Because the prosecution had agreed not to use Petitioner's taped statement in its case in chief, it was only because Petitioner testified that the jury ever heard the confession.

On the other hand, there was every good reason to try to persuade the jury that Petitioner's lapse in judgment had been in response to the heat of passion. The sudden confusion that arose in the park presented a strong basis to conclude that "the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation." *California Jury Instruction Criminal* 8.42. The jury, however, was not allowed to consider whether his state of mind at the time of the stabbing was the product of the pandemonium that all involved testified occurred. In failing to provide the jury with an instruction consistent with the most likely interpretation of the evidence, Petitioner's counsel was not only negligent, he virtually deprived Petitioner of a defense to the charge of murder.

Despite the court's finding that the imperfect self-defense was a strategic choice, the evidence belies this conclusion. In fact, apart from Petitioner's testimony, it pointed in only one possible strategic direction, which was toward relying on the commotion, adrenaline, confusion and other components of heat of passion. Inasmuch as Petitioner's counsel had requested and been given a manslaughter instruction, albeit on imperfect self-defense, it further demonstrates that counsel's tactic was not to take an all or nothing approach. Even assuming that the state of the record in this case could have supported gambling with either a conviction on the greatest charges or a complete acquittal, this was plainly not the choice counsel made.

The trial court's denial of the habeas petition never appreciates that the self-defense case it assumes petitioner was bound to follow in a singular manner had no support in

the record. Although the trial court stated that "[a] claim of heat of passion is inconsistent with self defense," this assertion finds little support in logic and even less support in the law. Under California law, when "there is evidence from which the jury could conclude that the lesser offense had been committed, the court must instruct on the alternate theory even if it is inconsistent with the defense elected by the defendant." *People v. Breverman*, 19 Cal.4th 142, 157 (1998) (quoting *People v. Sedeno*, 10 Cal.3d 703, 717 n.7.(1974)); *People v. Barton*, 12 Cal.4th 186, 203 (1995). The situation is all the more egregious when it is defense counsel that fails to take account of the state of the evidence.

Counsel's failure to seek an instruction on sudden quarrel was nothing less than unprofessional error in that Petitioner was deprived of an assessment of the evidence that identified the theories it most supported. It is inescapable from an examination of the record in this case that such an instruction not only ought to have been given, but that it would have represented the most likely verdict had it been given. While mere criticism of a tactic is not in itself sufficient to support a charge of inadequate representation, errors of counsel will not receive deference where they represent no strategy at all. *Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir. 1994).

II. The Court Erred by Not Granting an Evidentiary Hearing to Investigate the Extent and Significance of the Suppressed Exculpatory Evidence.

Similarly, the trial court underestimated the power and importance of the testimony that could have been obtained from Vaagn Arutyunian. Vaagn was among the group that had confronted Petitioner at the park and was the individual

who had driven the victim to the hospital. Within a few days of the incident, Vaagn had approached Petitioner's parents to tell them that he felt bad about what had happened. He told them that he knew that the victim had a belligerent intent when he went to the park that day and was looking for a fight. He further related that the victim told him that he was going to the park to hurt Petitioner's friends "bad."

However, after making this disclosure, Vaagn later became recalcitrant about testifying under pressure from his parents and friends. When he was later interviewed as a part of the habeas investigation, Vaagn stated that he knew both families and emotions were running high in the community. Although a defense investigator did approach Vaagn at some point, the investigator immediately relented when Vaagn told him that he was not interested in speaking with him. The investigator never sought Vaagn out again and never made an attempt to persuade him of the importance of his testimony. Vaagn states that he knew all of the young men involved in the altercation at the park and considered both Petitioner and the victim to have been friends.

In the course of his interview during the habeas investigation, Vaagn revealed that he was in a unique position to offer credible and first-hand information. Based on his familiarity with both Petitioner and the victim, Vaagn offered that he had never known Petitioner to be a fighter or a troublemaker while the victim, on the other hand, was a reputed steroid user whom Vaagn knew to be irrational and "was someone not to mess with."

Vaagn also observed Petitioner's demeanor when he arrived at the park and saw that Petitioner was interested in

talking rather than fighting. He shook hands with several people, including the victim, and seemed to be interested in finding a peaceful resolution. By contrast, Vaagn reported having observed that the group at the park was posturing aggressively before Petitioner arrived and while still at school, he had learned from the victim that he anticipated there would be a fight at the park. Vaagn further described having tried to counsel the victim out of getting into a fight and related that he had tried to get him to leave before Petitioner arrived. He also saw one or two young men swinging large bats at Petitioner.

Not only did Vaagn's potential testimony lend support to the self-defense/imperfect self-defense strategy that trial counsel relied on, he also could have offered compelling testimony as to the explosive circumstances during which the stabbing took place, thereby lending extremely credible support to the case for manslaughter resulting from sudden quarrel. From what Vaagn observed, the stabbing was an accident and Tino's decision to brandish the knife was a stupid mistake.

Significantly, Vaagn also related that after the fight, he was thoroughly interviewed by two police detectives in an interview room. There was a tape recorder on the table, in use, throughout the entire interview.

This interview and the substance of what Vaagn said were never turned over to defense counsel. Despite the strongly exculpatory nature of his statements, the fact that he was with the victim and lacked any apparent bias toward Petitioner, and the significance of his potential testimony for proving manslaughter whether by heat of passion or imperfect self

defense, the court baldly ruled that the suppressed statement was unhelpful and cumulative and an evidentiary hearing was not warranted. This erroneously ruling deprived Petitioner of evidentiary support both for his ineffective assistance of counsel claim and for his claim that his due process rights under *Brady* had been violated.

A. Relevance of Statement to Petitioner's Claim of Ineffective Assistance of Counsel.

With respect to his claim of ineffective assistance, Petitioner had argued that he was prejudiced by his attorney's failure to find and subpoena critical defense witnesses. To this end, Petitioner's ongoing habeas investigation had allowed him to identify two witnesses, among whom was Vaagn, who could have supported Petitioner's claim that he was not the aggressor and that around the time of the stabbing he was under attack by other individuals wielding weapons. This failure to secure critical defense witnesses was clearly a dereliction of counsel's professional duty where, as here, there could have been no strategic reason for failing to seek out such important testimony. Counsel was aware of the locations of these witness and the positive testimony that they could bring to the defense case. Under such circumstances, "an attorney 'must ... provide factual support for [the] defense where such corroboration is available.'" *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) (quoting *United States v. Tucker*, 716 F.2d 576, 594 (9th Cir.1983)) (explaining that the failure to pursue corroborating evidence may establish constitutionally deficient performance).

It is axiomatic that "counsel has a duty to make reasonable investigations." *Strickland v. Washington* (1984) 466 U.S.

668, 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* When one considers that the only defense in this case was Petitioner's impeached testimony and that no other witness supported Petitioner's claim that he had acted in self defense, the failure to redouble one's investigate a witness as promising as Vaagn was inexcusable. Likewise, there can be no justification for trial counsel's failure to make a specific request for statements and reports of statements made by Vaagn. As the individual who had driven the victim to the hospital while he expired in his car, it is unthinkable that the police would not have taken and preserved his statement.

The fact that Vaagn was capable of giving this kind of exculpatory testimony that he revealed in part to Petitioner's parents should have been cause for the defense to put substantial energy into obtaining his statement and securing him as a witness. Lacking any other witnesses, let alone an equivalent witness, Tino's counsel was mandated with an obligation to pursue Vaagn's testimony with far more vigor than was shown. Had this occurred, Vaagn's subsequent statements to Petitioner's habeas investigator show that he had even more important testimony to offer the defense. Certainly, there was no basis for concluding that any further inquiry would be fruitless or potentially harmful to his client. Id. The complete lack of attention to the facts underlying the case "presents a classic case of ineffective assistance of counsel." *Black v. Beto* (W.D.Texas 1971) 327 F.Supp. 1405, 1406 (concluding that "[w]here preparation is non-existent and client consultation so minimal, effective assistance of counsel is certainly not provided," *id.* at 1407).

B. Relevance of Statement to Petitioner's Due Process Claim.

Notwithstanding defense counsel's dereliction, the prosecution's failure to turn over Vaagn's statement as exculpatory evidence was an independent violation of Petitioner's due process rights. Only through an evidentiary hearing in which the suppressed evidence was exhumed and finally brought to light could the significance of this deprivation of constitutional rights be judged.

Due process requires that the prosecution not suppress evidence favorable to the accused or discrediting to its own case and that it disclose to the defense all such information. *Brady v. Maryland*, 373 U.S. 83 (1963); *See also Pennsylvania v. Ritchie*, 480 U.S. 54 (1987)) The decision in *Brady* followed the Court's decision in *Napue v. Illinois*, 360 U.S. 264 (1959), which required the prosecution to correct material false evidence even though it had not been knowingly admitted by the prosecution.

In *Brady* the court extended the principles of *Napue* to require the prosecution to disclose potentially exculpatory material to the petitioner. The standard was refined in*Giglio v. United States*, 405 U.S. 150, 154, (1972) in which this Court held that failure to disclose material, favorable evidence will result in reversal of a conviction if there is "any reasonable likelihood [that it would] have affected the judgment of the jury." The requirement of candor by the government encompasses all information which bears upon the credibility of its witnesses as well as matters more directly material to guilt or innocence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). *See generally, Bagley v. Lumpkin*, 798

F.2d 1297, 1300 (9th Cir. 1986)(conviction reversed due to government's failure to disclose $300 payment to the informants.) As stated by this Court in *Napue*, *supra*, 360 U.S. at 269:

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a petitioner's life or liberty may depend.

In *Bagley*, *supra*, the Court restated its definition of materiality under *Brady*. Suppressed exculpatory evidence is material -- and a new trial is warranted -- where:

> "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

473 U.S. at 682, (Justice Blackmun, joined by Justice O'Connor; *see also id.* at 685, 105 S.Ct. at 3385 (Justice White, concurring, joined by Chief Justice Berger and Justice Rehnquist); *Pennsylvania v. Ritchie*, *supra*, 480 U.S. 39, 58 (Justice Powell, joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor).) This test is "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." *Bagley*, *supra*, 473 U.S. at 682.

The good faith or bad faith of the prosecution in failing to disclose such favorable evidence is simply irrelevant. *Brady*, 373 U.S. at 87. *See also Bagley*, *supra*, 473 U.S. at 675-76; *Giglio*, *supra*, 405 U.S. at 154. A constitutional violation is deemed to have occurred regardless of whether the suppression is the "result of guile" or merely the result of innocent error. *United States v. Agurs*, 427 U.S. 97, 108 (1976). Instead, the "critical point" is whether the suppression of evidence denied the Petitioner his right to a fair trial. (Id.) "[I]t is . . . the character of the evidence, not the character of the prosecutor," which is at issue. (*Id.* 427 U.S. at 110.) In the eyes of the law, the failure to disclose evidence which would tend to exculpate the Petitioner or mitigate the Petitioner's punishment, transforms the prosecutor into "an architect of a proceeding that does not comport with standards of justice." *Brady*, *supra*, 373 U.S. at 88.

On remand, the Ninth circuit in *Bagley* again reversed the district court's denial of petitioner's motion to set aside his conviction. *Bagley v. Lumpkin*, *supra*, 798 F.2d at 1302. To determine whether the impeachment evidence withheld was sufficiently material to require reversal of petitioner's conviction, the court evaluated whether "if disclosed and used effectively, [the impeachment evidence] may make the difference between conviction and acquittal." *Id.* at 1300 (quoting *Bagley*). The court observed that its task was to "consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defense's case," and to assess that effect "in light of the totality of the circumstances." Id. at 1300-01 (quoting *Bagley*). The court observed that the proper inquiry is an objective one: Whether the "government's failure to

assist the defense by exposing information that might have been helpful in conducting cross-examination" undermines confidence in the outcome of the trial. *Bagley v. Lumpkin*, *supra*, 798 F.2d at 1301 (quoting *Bagley*, 473 U.S. 667).

This Court revisited *Brady* and *Bagley* in *Kyles v. Whitley*, 514 U.S. 419 (1995) . The *Kyles* majority opinion stressed the need to assess the cumulative impact of the non-disclosed information and explained that a showing of materiality does not require a finding that the suppressed evidence would result in an acquittal. The Court stated:

> "In . . . *United States v. Bagley*, 473 U.S. 67 (1985) the court disavowed any difference between exculpatory and impeachment evidence for Brady purposes . . . . *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, that a result of the proceeding would have been different (citations.). . . [A] showing of materiality does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . a 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' *Bagley*, 473 U.S. at 678." *Kyles* at 434.

This Court concluded, "confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the

eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principle police witness was insufficiently informed or candid." *Id.* at 454.

Here, the prosecution's failure to provide the exculpatory and impeaching information contained in Vaagn Arutyunyan's interview with the police violated Petitioner's right to due process of law. The fact that Vaagn was capable of giving such specific first-hand exculpatory testimony, demonstrated "a reasonable probability that, had the evidence been disclosed to the defense, that a result of the proceeding would have been different." *Kyles*, *supra* at 434, quoting *Bagley*, *supra* at 678. Moreover, inasmuch as Vaagn was friends with both boys, was at the park with the group that opposed Petitioner and drove the victim to the hospital, the importance of his statement is amplified as being relatively unbiased. Since Vaagn was as close to the action as anyone, his testimony would have provided valuable and, in this case, unique impeachment of the People's witnesses.

As a result of the prosecution's failure to provide Vaagn's police interview to the defense, critical evidence that cast doubt on the People's case was never brought to court. Because of the court's refusal to hold an evidentiary hearing, it was also excluded from the review of Petitioner's claims on habeas corpus. To state as the court did that "any alleged failure on the part of the prosecution to reveal Mr. Arutyunyan's statement did not prevent the defense from having the opportunity to contact and interview him" rings hollow and abundantly shows how much the trial court failed

to see the significance of the statement that Vaagn made to the police. If the prosecution had complied with its clear *Brady* obligations, the defense would have been in a position to subpoena Vaagn, even if he was unwilling to come to court on his own. As this case was tried, Petitioner lacked any coherent defense apart from his own testimony, which was in turn impeached by his confession. Had the defense been provided with the statement, it would have been impossible to act competently without calling Vaagn as a witness. Even without his cooperation, Vaagn's taped statement would have provided the defense with a roadmap to his testimony and ample ammunition for impeachment if it was required.

This failure by the prosecution to provide *Brady/Bagley/Kyles* information, in the possession of the police assisting in the investigation, denied Petitioner due process of law under the Fourteenth and Fifth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the California Court of Appeal denying Petitioner a writ of habeas corpus. It is submitted that under these facts Petitioner was denied his right to due process of law and effective assistance of counsel and that the errors made in the state courts warrant this Court's review.

Dated: March 11, 2003 Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re	)	B161512
	)	
TINO SAFARIAN	)	(Super.Ct.No.
	)	GA026936)
	)	
	)	(Steven C.
On Habeas Corpus	)	Suzukawa, Judge)
	)	
	)	

Entered September 26, 2002

ORDER

THE COURT*:

The petition for writ of habeas corpus filed herein September 18, 2002 has been read and considered. The court has also examined the file in proceeding number B107128, petitioner Safarian's direct appeal from the judgment in Los Angeles County Superior Court case number GA026936. The petition is denied.

*JOHNSON, Acting P.J., WOODS, J.,

PERLUSS, J.

APPENDIX B

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Entered January 25, 2002

Case No. GA026936

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 01: TINO SAFARIAN

Count 01: 187(a) PC Fel - Murder.

On 01/23/02 at 830 AM in L.A. Superior –
So Central Dept SCE

Case called for habeas corpus petition

Parties: Steven Suzukawa (Judge)
Frances Jefferson (Clerk)
None (Rep)
None (Dda)

Defendant is not present in court, and not represented by counsel

The court has read and considered petition for writ of habeas corpus.

Petitioner seeks a writ of habeas corpus arguing he was denied effective assistance of counsel and was the subject of prosecutorial misconduct. A very extensive petition, complete with voluminous attachments and declarations, has been reviewed by the court. Notwithstanding the time and effort put into the petition, there are no grounds to set aside the verdict.

In order to prevail on a claim of incompetent counsel, Petitioner must establish his attorney's performance was sub-standard and Petitioner was prejudice [sic] thereby. (*Strickland v. Washington* (1984) 466 U.S. 668. Put another way, counsel's performance or omissions must have resulted in the withdrawal of a meritorious defense. (*People v. Pope* (1978) 23 Cal.3d 412.) While Petitioner has grave reservations about the way his trial was handled, he cannot establish the requisite prejudice.

Several of his claims should be addressed separately. First, Petitioner urges he was prejudiced by trial counsel's failure to ask for an instruction on the crime of manslaughter based upon heat of passion. The difficulty with this position is two fold. One, Petitioner testified he was acting in self defense. The Court read the instructions related to both reasonable and unreasonable self defense. A claim of heat of passion is inconsistent with self defense. Two, even if the instruction was appropriate, the issue was appropriately handled by Petitioner's appeal. Such an instruction, if it had been supported by the evidence, would have been required to

be given *sua sponte* by the trial court. Counsel's request would have been unnecessary.

Second, a number of Petitioner's arguments attempt to recreate certain aspects of his trial. He makes claims regarding his testimony which was offered at trial. He asserts he was forced to testify and was unprepared. He offers no reason why such claims were not proffered on direct appeal. His attempt at revision rings hollow.

Third, the remainder of Petitioner's claims demonstrate how different trial counsel might have proceeded. Whether a different defense strategy would have resulted in a better result is pure speculation. What is clear is that Petitioner had a full airing of all the relevant issues. Individuals who were not a part of the group fighting clearly testified Petitioner was the aggressor and did not act in self defense. Petitioner argues he had a witness, Richard Caverly, who could have offered compelling evidence. Caverly's declaration is provided as an exhibit to the petition.

Mr. Caverly was a witness who knew about the trial and made it clear he was not inclined to come to Los Angeles from his home state of Washington. He claims now no one tried to persuade him to come to the trial, but his own declaration belies that assertion. Why would he have bothered to tell trial counsel about the difficulties of coming back to Los Angeles to testify unless he had been asked to. In addition, Mr. Caverly's recollection of the events was inconsistent with every other witness who testified . . . . including the defense witnesses. No one else claimed the stabbing took place in a location other than in the parking lot. Mr. Caverly was the only witness this court was aware of who

claimed anyone was chasing Petitioner with a baseball bat near the diamond. There was a very simple tactical reason for discounting Mr. Caverly's testimony on that ground alone.

Finally, Petitioner claims he was denied crucial discovery in the form of a statement by one Vaagn Arutyunian. The difficulty with this claim is Mr. Arutyunian and one of Petitioner's relatives admit Mr. Arutyunian was approached by the defense and he refused to get involved. Any alleged failure on the part on the prosecution to reveal Mr. Arutyunian's statement did not prevent the defense from having the opportunity to contact and interview him. His decision to remain silent cannot be revisited now. In addition, any testimony he could have offered would have been cumulative.

In the final analysis, Petitioner and his supporters cannot believe he was convicted of murder. They believe the result was unjust. This is understandable. However, it does not justify disturbing the jury's verdict.

The writ is DENIED.

A copy of this minute order is sent to Petitioner via U.S. mail at his counsel of record's address:

Michael Norris, Esq.
Michael Norris, Inc.
120 Fisherman's Wharf
Redondo Beach, California 90277

Next scheduled event:
Proceedings terminated

APPENDIX C

Entered December 11, 2002

S110550

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re TINO SAFARIAN on Habeas Corpus

Petition for review DENIED.

GEORGE

Chief Justice

APPENDIX D

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.